NO. 47273-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

WILLIAM BARRY SELLEY

v.

STATE OF WASHINGTON

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy
Pierce County Superior Court Cause No. 12-1-03671-5

CORRECTED BRIEF OF APPELLANT

By
Barbara Corey
Attorney for Appellant
WSB #11778

902 South 10th Street
Tacoma, WA 98402
(253) 779-0844

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal

State

Constitutional Authority

Rules and Regulations

Other Authority

A. ASSIGNMENTS OF ERROR.

1. The deputy prosecutor committed misconduct throughout the case thereby requiring reversal of Selley's conviction.

2. The trial court erred when it excluded evidence that the alleged victim was a chronic alcoholic where this evidence was relevant for the jury to assess statements that she had made to others about the alleged abuse, relevant to her physical injuries and her physical condition where medics first contacted her, and also where she had fallen and hurt herself on numerous occasions when intoxicated, resulting in injuries similar to those in the instant case.

3. The trial court erred when it failed to give defendant's proposed instruction no. 9, the no duty to seek medical care, where the State attributed Southward's death in part speculation that Selley had refused to obtain medical care timely for her.

4. The deputy prosecutor committed misconduct when she committed on the credibility of the defendant during an objection and repeatedly attempted to elicit opinion testimony that he was untruthful.

5. The trial court erred when it imposed an exceptional sentence.

6. The trial court erred when it entered conclusion of law no. I in support of the exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Selley was deprived of his Article 1, sec.3 and 14th Amendment due process rights to fair trial.

2. The prosecutors committed egregious, ill-intentioned, serious and highly prejudicial misconduct that compels reversal.

3. The trial erred by refusing to give defendant's proposed instruction no. 9 which correctly informed the jury that he had no duty to summon medical care for a competent adult where the State argued that he somehow should have summoned medical aid for Southward.

4. Selley was denied his Due Process rights under Article 1, sec.3 and 14th Amendment where the State failed to prove both the substantive crime and the charged aggravators beyond a reasonable doubt.

5. The trial court erred when it imposed an exceptional sentence based upon the aggravators found by the jury where the State had not proven those aggravators beyond a reasonable doubt.

C. STATEMENT OF THE CASE.

1. Procedure.

a. Procedural Facts.

Appellant Barry William Selley was charged by 3rd amended information with murder in the second degree for the death of his live-in girlfriend Kathryn Southward. CP 9-10. Trial was held before the Honorable Judge Edmund Murphy from September 29, 2014 through December 8, 2015. The jury convicted Mr. Selley as charged with special findings that he was in a domestic relationship with the victim and that there had been a pattern of domestic violence in their relationship. CP 234,235,236.

From the beginning of the case, the court excluded evidence that Southward was an alcoholic. RP3 365-366. The court did this even though on numerous occasions prior to the instant case, and in non-domestic violence contexts, Southward had fallen down drunk and sustained serious injuries. RP 386. The evidence was relevant not only to explain the origin of her injuries but also to dispute that her injuries occurred from domestic violence. RP3 386.

Although the statement "beat the shit out of her" was repeatedly attributed to Selley, it in fact originated with the 911call taker. RP4 579. It was not said by Selley in any of the reported calls. RP4 580-581. The

statement, however, was used to appeal to the passions and prejudice of the jury during closing argument.

During the cross-examination of Det. Salmon, counsel inquired why the detective failed to obtain the security video showing Southward falling from the barstool. RP4 587. Salmon responded that he did not know the name of the bar. RP4 586. Defense counsel asked, "And had you asked and known from Mr. Selley what bar they had been at on the 27th [date of the interview], then on that day, or the 28th you could have gone to Johnny's Bar." Prosecutor: "Objection, Your Honor; calls for speculation that he would have received the correct answer and truthful answer about what bar it was and where to go." RP4 587. The court sustained this objection. Id. This exchange reasonably suggested to the jury that the State was right to question the defendant's ability to give correct and truthful answers.

The court noted that the prosecutor's comments were unfortunate. RP5 607. The comments brought into question whether the detective received a correct or truthful answer from Selley. RP5 607.

The prosecutor continued to elicit testimony to obtain comments on Selley's credibility. When examining the Salmon, the lead detective, the deputy prosecutor elicited his opinion that had he known how Southward's injuries occurred he would have notified the hospital. RP6 665. The

prosecutor elicited Salmon's opinion that Selley's statements about how Southward's injuries had occurred had changed during the interview prior to the detective's lies to him about speaking to Southward and then afterwards. RP6 671. Salmon also claimed that there had been a "very slight" change at the jail interview as well. RP6 672. In addition, testifying to inconsistent statements, all made on the same day, when Salmon also testified that Selley was calm and reserved, throughout, Salmon intended to suggest that Selley's inconsistent answers were not the product of emotional distress. RP6 674. When defendant objected to these questions and later moved for a mistrial based on State's repeated attempts to portray Selley as untruthful, the trial court denied the motion. RP6 681-683, 685-686. The court stated," I don't believe that it rises to the level of a mistrial. I don't believe it rises to the level of misconduct, but I think it may have been –the issue the Court had was the formation of the question, as has been indicated with the sustained objection." RP6 686.

The trial court denied the defense motion to reconsider admission of evidence of Southward's alcoholism where medics had testified that alcohol consumption affects blood clotting, the formation of bruises, vital signs. RP7 878-879, 910 [the need for urgency in getting Southward to the hospital in this case arouse from a fear that "this person could die from their injuries" and "I

believe it was based off her vital signs. . . "]. Selley argued that this evidence was admissible because the State admitted evidence of Southward's vital signs through every medical witness and Selley could not cross-examine these witnesses given the court's ruling. RP7 879. The court erroneously denied the motion holding, "there has been no testimony that her vitals are in any way related to alcoholism." RP7 880.

Prior to Selley's testimony, the State moved to limit his testimony to prohibit testimony regarding Southward's alcoholism. RP 19 2673. The State asked the court to affirm "that the defendant would not be permitted to go into the victim's heavy drinking or alcoholism, and the only incidents he would be permitted to testify about as far as if he has a different account for any fall or anything of that nature would be on the same dates as the alleged prior incident for the aggravator and for lack of accident and for this incident." RP19 2673.

Selley responded that the given the aggravator of domestic violence, the court should not require the defendant to sanitize his relationship with Southward. RP19 2673. Her chronic alcohol use was a major problem in the relationship. RP19 2674. It led to many arguments. RP19 2674. For example, in the Larriva incident, Southward ran from the house because she was angry that Selley would not allow her to keep drinking. RP19 2674. Exclusion of her

alcoholism would affect the credibility of the defendant when he testified regarding this incident. Further, even the day after she fell down coming back into the house from Johnny's bar, Southward begged for a drink and Selley said no. RP19 2675. The State sought to portray Selley as callous and uncaring when nothing could have been farther from the truth.

The court agreed to admit limited testimony about the Larriva incident but nothing else. RP19 2676.

At sentencing, the court imposed an exceptional sentence of 480 months. CP 365-377. The court entered Findings of Fact and Conclusions of Law for Exceptional Sentence. CP392-395

Mr. Selley timely filed this appeal. CP 378-391.

a. Overview of Testimony

Selley began an exclusive relationship with Southward in 2005. RP19 2692. 2693. During their relationship, there were never any allegations he had committed any assaults or acts of domestic violence against Southward. RP19 2695-2696. Throughout their relationship, Selley was never served with any type of restraining order or order or protection. RP19 2695.

On September 23, 2012, Selley and his live-in girlfriend Kate Southward went out for drinks at Johnny's Bar in Puyallup with Todd

McIntosh, a coworker. RP19 2804. She drank vodka and switching back and forth to Crown and Coke. RP19 2807. Southward consumed approximately seven drinks and became extremely intoxicated and fell off the bar stool. RP19 2807, 2808; RP20 2869-70. After the fall she appeared dazed for a minute and then eventually stood up. RP19 2809. Southward did not want any medical treatment. RP19 2810.

Southward required assistance to walk to their car. RP19 2811, 2814. Selley and McIntosh were worried that she would fall down if she tried to walk on her own. RP19 2814.

Selley also was intoxicated and had some concerns about his ability to drive home. RP20 2810. When they arrived at their residence in Gig Harbor, Selley asked Southward for the house keys. RP20 2870. They were both in the car. RP20 2870. He asked her multiple times and each time she replied that she did not know where the keys were. RP19 2817; RP20 2871. He continued to ask her where the keys were without success. RP19 2818. Selley was extremely frustrated and wanted to go to bed. RP 2872. His tone of voice became louder and he repeatedly said," Where are the fucking keys?" RP20 2872. Southward simply did not know. RP20 2872. After attempting to find the keys, Selley walked to the front door and kicked the door in. RP20 2874-2875.

He then returned to the car to help Southward in. RP20 2876. She was so intoxicated she could not move. RP20 2877. Selley tried to help her out of the car because she could not get out of the car on her own. RP20 2877. He helped her stand up by the car but she immediately fell over. RP20 2878. Because Selley had been painting the house, they fell on painting equipment such as ladders and scaffolding that lay in front of the house. RP20 2379, 2880.

He again tried to support her by the arms and walk her to the house but she stumbled and slipped forward, falling into a garbage can and a recycle bin. RP10 2379. Selley also fell into the ground. RP10 2879-2880. By the time Selley got up and tried to help her, Southward had fallen into more objects and had hooked herself up with the ladder. RP20 2880. Selley eventually used a "fireman's carry" and dragged Southward into the house. RP20 2882. Inside the house, Selley put her down on the couch. RP20 2884. The next day, she hit her head on a glass table when she got up. RP20 2887. Southward was still very intoxicated. RP20 2894. Southward got up to use the bathroom but otherwise rested on the couch. RP20 2898.

On Tuesday Southward was alert and talking to Selley. RP20 2903. Selley's mother brought over some 7-UP, ice cream and juice. RP 2905-2906. Southward ate some yogurt. RP20 2906. She also took a shower. RP20 2930.

Southward fell down the stairs after her shower. RP20 2931-2932. The shower was upstairs. RP20 2931.She later walked into the kitchen as well as the bathroom. RP20 2935. Although Southward said she was sore, she did not want to seek medical attention. RP20 2936.

On Wednesday Southward ate a little yogurt. RP20 2939. Selley made a trip to Kentucky Fried Chicken to buy mashed potatoes and gravy, one of Southward's favorite meals. RP20 2939. She ate only a little bit. RP20 2940.

Southward was not feeling well in the morning and afternoon but they talked, laughed a little, and watched television. RP20 2940. She walked into the bathroom be herself. RP20 2941.

In the evening Southward started to vomit. RP20 2042. Sometime around midnight she seemed to worsen. RP20 2945-2946. He helped her into the bathroom because she wanted to vomit. RP20 2946. She could not walk without assistance. RP20 2947. When he helped her out of the bathroom, she fell and knocked her head, perhaps on the bathroom cabinet. RP20 2947. Selley picked her up and helped her back to the couch. RP20 2948.

He placed a bowl by the couch for her vomit. RP20 2949. He thought that the vomit appeared unusual RP20 2949. Because he thought something was wrong, he called his mother to come over and help him take Southward to the hospital. RP20 2948- 2950,

Selley told Southward they were going to the hospital. RP20 2050. When his mother arrived, they agreed that it would best to call 911. RP20 2952-2953.

Police arrived with medics. RP20 2957. After medics left, police stayed in Selley's house. RP20 2958. Pierce County Sheriff's deputy Tiffany asked him some question and then went in and out of the house looking around. RP20 2064. Tiffany told him not to go the hospital right away because it would take a little time to admit Southward. RP20 2967.

Later PCSD Det. Salmon arrived with Tiffany. RP20 2968. Selley voluntarily gave a statement to Salmon. RP20 2969. After Selley was arrested and taken to jail, Salmon visited him in the jail to show him photos of Southward. RP20 3004. Selley was very upset. RP20 3004.

The State's theory of the case was that Selley had assaulted his live-in girlfriend Kate Southward in the early morning hours of September 24, 2012. RP 2 140. Neighbors stated that they heard a male voice yelling, a female calling for help, and what sounded like slamming against a wall or something/someone being thrown. RP2 140.

Neighbor Jody Coy heard sounds consistent with someone kicking in a door. RP7 972. She acknowledged that the sounds could have come from elsewhere in the neighborhood and been completely unrelated to this incident.

RP7 972-973. The noise was not loud enough to awaken dependent adults in her care. RP7 944, 974. She thought about calling 911 but made the decision not to do so. RP7 973.

Neighbor Stan Allen also heard some noises that Sunday morning. RP8 1141. He heard a loud crash like a door being kicked in. RP8 1150. He also heard the sound of aluminum cans maybe being kicked. RP8 1150. In the morning when Allen drove by the Selley residence, he saw cans, a garbage can, soda and beer cans, etc.,in the driveway. RP8 1161-1162.

Dr. Paul Inouye was the trauma physician in the ER when Southward arrived at TG. RP15 2198-2199. He was told by medics that she had fallen down stairs three days prior to her arrival. RP15 2199, 2208-2209. He learned from them as well that when she fell Southward sustained multiple bruising and also that her boyfriend had called 911. RP15 2281. Dr. Inouye had never treated a patient who presented three days *after* a fall down the stairs and so he did not have any basis of comparison for the spectrum of bruises/injuries he observed on Southward. RP15 2287.

Dr. Inouye testified that he did not have the forensic expertise to opine that Southward's injuries were the result of an assault. RP152280. He did allow that it was "possible" that her injuries were consistent with an assault.RP15 2302.

When Southward was examined shortly after her arrival at Tacoma General Hospital on Thursday morning, September 27, 2013, doctors diagnosed a subdural hematoma, extensive bruising over multiple areas of her body, a collapsed lung, a lacerated liver, internal hemorrhaging, blood loss, rhabdomyolysis [breakdown of muscle and tissue]; a ruptured colon, and other injuries that led to liver and kidney failure. RP2 146. Dr. Inouye saw bruises of indeterminate age. RP15 2284.

Dr. Inouye testified that pressure sores or bedsores can develop in about a day; rhabdomyolysis can develop in a few hours. RP15 2287. Intestines can become nonviable for many reasons including contusions, bruises, poor blood flow. RP15 2287-2288. A perforation may result from insufficient blood flow, overwhelming sepsis, or a multitude of factors. RP15 2289.

After several hours of trauma care, Southward "came around" and was able to answer questions appropriately. RP9 1260. She told the nurse that no one at home was hurting her. RP9 1262. She also told the nurse that it was safe for her to go home. RP9 1262. When the nurse asked her what had happened, she said she could not remember. RP9 1262. The nurse did not ask Southward if the injuries had occurred at home. RP9 1268. Once she "came

around", she maintained she level of consciousness throughout her time with the trauma nurse. RP9 1263-1264.

Contrary to nurse Carpenter, PCSD deputy Todd, who contacted Southward in the ER. described her mental state as somewhere between unconsciousness and consciousness. RP9 1372. He had a conversation with Southward but he did not record it because he did not have a tape recorder and he would not record a statement from an uncooperative individual. RP9 1373. Southward told him that she did not know what had happened to her. RP9 1373-1374.

Trauma nurse Carpenter believed that Southward's injuries were inconsistent with a ground level fall or even a couple of ground level falls. RP9 1066. Nurse Carpenter defines a "ground level fall" as "falling from a walking position." RP9 1287. The majority of ground level falls seen at the hospital involve elderly patients. RP9 1289. She agreed that various factors can impact the severity of a ground level fall. RP9 1288. For example, if a person were intoxicated at the time of the ground level fall, it could be easier to fall given slower reaction times and poor coordination. RP9 1288. Extreme intoxication would exaggerate these factors such that even when a person got up she would be likely to fall again. RP9 1288. Subsequent falls could be

other sides of the body and injure other angles of the body, resulting in injuries on different planes of the body. RP9 1289.

When Southward arrived at the hospital, Nurse Carpenter did not know that she had been so intoxicated that she had to be pulled out of the car because she could not get out be herself. RP9 1291. They did not know that she had been extremely intoxicated when she sustained the injuries. RP9 1292-1293. She did not know that she had been dropped a few times by Selley when they walked to the house because he also was intoxicated. RP9 1293. She did not know that at one point Southward was moved by being pulled. RP9 1294. She did not know that the surface of the driveway was paved. RP9 1293. She did not know that in the intervening days between the return to the residence and her arrival at the hospital Southward had fallen more times. RP9 1294/

Southward refused to permit law enforcement to take photographs of her injuries. RP9 1370.

The State alleged that Southward had laid on a hard surface for several days and that this causes the rhabdomyolysis. RP2 147. The State contended that two witnesses, Dr. Richardson and Dr. Hannigan, would support that diagnosis. RP2 147. However, Dr. Richardson testified that rhabdomyolysis could occur in a person who was lying on a bed for days. RP23 1894.

It could occur in an individual lying on a couch with a 6"-8" cushion in a couple of days if there was no movement. RP12 1896. Even so, it is possible for an individual with rhabdomyolysis to walk even with some difficulty. RP12 1896-1897. Richardson testified, but not to a reasonable medical certainty, that Southward's kidneys had not been working for 2-3 or 3-4 days prior to her admission to the hospital. RP12 1904; RP13 1953 . Richardson had gleaned information that Southward had lain on the floor for several days from chart notes but did not know the original source of that information. RP13 1961-1962, 1963. Even assuming that Southward had been on the floor, she could have developed rhabdomylosis during a period from six hours to days. RP13 1964.

Southward had a healing liver laceration. RP14 2133.

Dr. Richardson did not take a social history of Southward from her family. RP13 1972.

Cynthia Smith, a physician's assistant who assisted Dr.Jacoby with an exploratory laporatomy of Southward's abdomen, agreed that there was a defect or perforation to the bowel. RP113 1993-1994. Smith did not believe this perforation or the other bruises or injuries she observed were consistent with a small tumble to the ground. RP13 2012.

Dr. Jacoby, the trauma surgeon who performed the exploratory laporatomy, observed physical findings that caused him to believed that an injury to the bowel had occurred days before the operation and that the body had already started to form scar tissue. RP 14 2068.

Dr. Jacoby noted a perforation to the right colon. RP14 2070. Had Southward arrived at the hospital in the "golden hour of trauma", she would have survived that injury. RP14 2135.

Dr. Jacoby testified, again *not* to a reasonable medical certainty, that the perforation to the bowel "might have occurred at the time of the trauma, or sometime thereafter, but certainly prior to her arriving at our hospital. Due to all the bile staining the, the perforation had been there likely longer than 12 hours, perhaps even 24 to 48 hours." RP15 2074. The injury to the colon was the result of blunt trauma. RP15 2074 and "likely happened at the time of the original trauma." RP15 2074.

The State contended that, according to Dr. Jacoby, Southward's injuries were inconsistent with a fall and were consistent with blunt force trauma inflict two to three days prior to her admission to the hospital. RP2 147-148. Dr. Jacoby had never heard any one attribute Southward's injuries to a ground fall. "I don't recall that was ever presented as a possible mechanism of injury." RP14 2126.

Dr. Jacoby testified *to a reasonable medical certainty* that Southward's injuries were consistent with a fall down the stairs. RP14 2158.

The State did not ask Dr. Jacoby about the patient history in the medical chart. Passim. In the "history of present illness" section of the chart, Dr. Hannigan had noted that Southward had a fall on Monday [September 24] and had fallen down the stairs three days prior to the 28th [September 25]. RP14 2120-2121. Dr. Jacoby considered Southwards injuries in the context of a fall down a flight of stairs and acknowledged that they were consistent with such a fall. RP14 2124. Dr. Jacoby also acknowledged that Southward's injuries were consistent with getting out of a car while extremely intoxicated, requiring assistance, stumbling, falling multiple times, being dropped, trying to stand up and being unable to do so, swaying from side to side and falling, as well as later falling and hitting her head on the edge of a table. R14 2125.

Despite the severity of her injuries Southward may have been able to walk albeit with pain and difficulty, or even assistance. RP14 2131, RP15 2299. People with rib fractures may be in pain and may walk. RP14 2131. Rib fractures can be caused by non-trauma, such as athletics, coughing. RP14 2131. People who fall down the stairs and sustain injuries such as Southward may be able to walk around. RP14 21132. People with injuries such as Southward may be able to sip juice, water. RP14 2132; RP 2300.

Det. Salmon looked at the front door to the residence on September 2, 2012, he noted damage above and below the lock. RP5 619. This damage was consistent with the door being forcible open, as if the door frame had been kicked or pushed open. RP5 619-620. This was consistent with the door being opened by someone who did not have a key. RP5 620.

Dr. Thomas Clark, the Pierce County Medical Examiner, testified that based on his review of the medical records, the surgeons did not know there was a bowel perforation until they started the surgery. RP16 2443. Clark agreed that contamination could have introduced in the hospital. RP16 2445. He agreed that there was a window of time during which such perforations could be medically treatment with success. R{16 2462-2463. A perforation could be caused by a lack of blood flow or disease. RP16 2467. These factors could not be eliminated in this case. RP16 2467.

Dr. Clark agreed that falling down the stairs could produce many injuries on many planes of an individual's body depending, for example, on the positions that the person assumed while falling, whether the person hit multiple stairs, whether there were objects on the stairs. RP 16 2447-2448. Dr. Clark also agreed that there were many factors that affected the blood's ability to clot. RP!6 2448-2449.

Dr. Zheng Ge, a nephrologist, testified that given her failing kidneys and other injuries, Southward would have had a hard time moving the day before she was brought to the hospital. RP17 2503. Although it would have been difficult, it would not have been impossible. RP17 2503.

D. ARGUMENT.

1. THE TRIAL COURT PROCEEDINGS WERE SO RIFE WITH ERROR AND PROSECUTORIAL MISCONDUCT THAT REVERSAL IS REQUIRED.

Both the state and federal due process clauses mandate that criminal prosecutions comport with prevailing concepts of fundamental fairness. *See. State v. Wittenbarger*, 124 Wn.2d. 467, 474-475, 880 P.2d 517 (1994); Art. 1, sec. 3; Amend. 14. Further, although there is no right to a perfect trial, a criminal defendant is entitled to a trial that is fair. *State v. Paumier*, 176 Wn.2d 29; 44, 288 P.3d 1126 (2012).

Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 858. 147 P.3d 1201 (2006)). Instead of examining improper conduct in isolation, the courts determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence

presented, "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Generally the prosecutor's improper comments are prejudicial "'only where "there is a *substantial likelihood* the misconduct affected the jury's verdict."'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *McKenzie*, 157 Wn.2d at 52 (quoting *Brown*, 132 Wn.2d at 561)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 50 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *State v. Monday*, 171 Wn.2d 667, 676.257 P.3d 551(2011).

In this case, the trial was long – more than 11 weeks. The issue was the cause of Southward's death. Did Southward, a chronic alcoholic with a history of falls some of which required medical treatment, seriously injure herself after a major binge on September 23-24, 2012, or did defendant Selley assault her so as to cause her death? Was Southward capable of seeking medical attention during the period between September 23 -28. Or did Sellley have such control over her that he refused to get any medical care for her until it was too late to be of any benefit?

From the outset, the State discounted the defense that Southward's injuries were consistent with those Selley described in his statement to police. He had detailed many falls by a drunken woman onto ladders, painting equipment, and other objects. E.g., RP20 2379, 2880 He recounted how Southward had been so intoxicated that he had to pull her out of the car, after which she dropped to the ground. RP20 2877, 2878 He stated that the only way to get her into the house was to drag her with the "fireman's carry" and that during that process she bumped her head on the step. RP20 2882. He recounted numerous falls inside the house, including hitting her head on a glass table, falling down the stairs, and falling in the bathroom. E. g., RP20 2887, 2931, 2932, 2947. Despite this knowledge, the deputy prosecutor made a decision early on in the case to refer to these falls as "ground level falls", a

term of medical use describing falls from a standing position. E.,g. RP3 146, 147, 148, 149 RP5 734-737 RP9 1252 RP14 2061-2062 RP14 2126 She knew that Selley had never described "ground level falls" as the cause of any of the injuries. RP20 2877, 2878, 2879, 2880, 2882, 2887, 2947; Supp CP 402,

Exhibit 1

"And, then some. Somehow we made it back here, but I didn't realize till we got back that we were do drunk , basically couldn't walk. Page 3 of 16: And, so I'm like on, let's go, let' get out, let's go. Id. And she's like, we couldn't . . . .I grab her to go out of the car and we instantly fall crash to the ground. And . . . just remember a haze of it and crashing to ground. Id. And then I'm like oh, shit. Id. And I'm like well, I get up. Id. We get up, I get up, I'm like come on. Id. We get up, boom, I dropped her. . . Id. And I tried again, I think, I think I dropped her again Id. I fell but I'm not, I didn't fall hard. Id. You know, you know, I fell, hit my hip and everything, and my hands, but I didn't, but I didn't , that was it. . . Id. And then I had to get her in the house, I drug her in the house. Id. I drug her in the house. Id. And she's like a limp body. So I drug her in the house basically and . . . " Id.

While trying to get into the house, Southward hit the concrete many times. Exhibit 1, page 8 or 16. She went over the ladder and the planter. Id.

Selley continued to describe the falls, which most assuredly were not "grounds falls" as the deputy prosecutor consistently and purposefully misused the term throughout the trial. He reiterated "she hit the ground the hard." Exhibit 1, page 4 of 16. Once inside the house, she fell backwards and hit her hear "hard, so hard" on the glass table. He eventually got her out up on the couch. Id.

Selley reported that on Monday morning when Southward got up, she fell gain and hit her head on the table. Id.
[1]

[1] Exhibit 1, designated Sup. Clerk's Papers admitted and published 10/27/14, redacted interview Det. Salmon and Defendant Selley

Nevertheless, from the onset of the case, the deputy prosecutor planted in the minds of the jury that the defense contended that Southward's injuries were caused by "ground level falls" and then elicited testimony from each medical professional that the injuries were inconsistent with "ground level falls." This deliberate twisting of the anticipated defense in the case caused the jury to view Selley with suspicion and surely to question why the State of Washington was spending so much time on "ground level falls" when that was not even an issue in this case.

The State elicited substantial testimony whether Southward's injuries were consistent with "ground falls." E.g., RP6 797; 810. These are falls from a standing position, for example, when a standing elderly person simply falls down, perhaps from dizziness. RP6 797.

The prosecutor elicited from a trauma nurse that the kind of injuries common from a "ground level fall" are injuries to the brain and spinal cord. RP8 1216. Other injuries could include broken and dislocated bones and joints, blunt trauma to the chest that would result in a collapsed lung. RP8 1216.

The prosecutor elicited testimony from the trauma nurse that Southward's injuries were inconsistent with a "ground level fall." RP9 1252.

The prosecutor elicited testimony from Dr. Jacoby, a trauma surgeon, that Southward's injuries such as the displaced rib fractures of 7-11 were "not necessarily" consistent with "*a* ground level fall." RP14 2061-2062.

However, after reviewing the entire medical record, Dr. Jacoby testified that there was no report in the medical record that Southward had ever had a "ground fall." RP14 2126. Dr. Jacoby stated, "I don't recall that that was ever presented as a possible mechanism of injury." RP14 2126.

The State's sole purpose in advancing a line of questioning to eliminate a non-existent causation of injury must have been to persuade the jury that none of Southward's injuries could have been caused by any fall. The State did not ask its witnesses whether Southward could have sustained her injuries in a complex fall, which is a fall advanced beyond a ground level fall. Such a fall includes differences based on the height of the fall, the speed the person or object the person was in at the time of the fall, what, if anything, the person fell on. RP6 810.

The State used the "ground fall" theme offensively. The State wanted the jury to close its ears to Selley's testimony that prior to her arrival at Tacoma General Southward had been sick for several days. RP6 846. Her

condition had declined recently. RP6 846. That was the reason he called 911. RP6 847. When they arrived home on September 24, 2012, she had fallen multiple times over ladders. RP6 848. Selley also stated that she had fallen multiple times over the past few days. RP6 851. She had refused medical attention and he had called them when she was unable to refuse medical attention and she clearly required it. RP20 2901, 2902 RP20 2926, 2927, 2937, 2943, 2944, 2950

The deputy prosecutor thus made a decision to deny Selley a fair opportunity to present his case by purposefully mischaracterizing the types of activities that Southward had engaged in when she sustained her injuries. Through this deliberate ploy, the deputy prosecutor denied Selley his constitutional right to due process, a fair trial, and to present a defense.

The deputy prosecutor also committed misconduct by interposing objections that were comments on Selley's credibility and committing numerous acts of misconduct in closing argument.

Next, the deputy prosecutor made gratuitous and impermissible comments about Selley's credibility during witness testimony. When defense counsel asked the lead detective why he had not obtained a security video from the bar when Selley and Southward had been drinking September 23, the

detective stated that he did not know the name of the bar. RP4 587. The detective was asked, "And had you asked and known from Mr. Selley what bar they had been at on the 27th [date of the interview], or the 28th, you cold have gone to Johnny's Bar ...". RP4 587. The prosecutor then interposed the following objection. "Objection, Your Honor, calls for speculation that he would have received the correct answer and truthful answer about what bar it was and where to go." RP4 587 . In this objection, the deputy prosecutor called Selley a liar – the question was objectionable because it presumed that Selley could/would not tell the truth. Although there is no impropriety in the prosecutor's use of the word "liar" in closing argument where evidence the defendant was untruthful, there are limitations to the other use of that term or innuendo at trial. *State v. Jefferson*, 11 Wn. App. 566, 569-70, 524 P.2d 248 (1974). Simply put, there is no authority that permits a prosecutor to put before the jury through an objection her obvious belief that the defendant would not tell the truth.

The deputy prosecutor also committed misconduct during closing argument. It is well-settled that the prosecutor's closing arguments often compromises reversible error. This error may take various forms. This occurred in this case.

A defendant's constitutional right to the assistance of counsel can be infringed by a prosecutor's comments that denigrate defense counsel. Prosecutorial attacks on defense counsel include insinuations on defense counsel's integrity and credibility.

The Washington courts adhere to the rule promulgated by the highest courts of the land that the prosecutor may not denigrate defense counsel. This denigration prohibits any suggestion that defense counsel should not be believed. Thus, a prosecutor must not impugn the role or integrity of defense counsel. a prosecutor must not impugn the role or integrity of defense counsel. *Warren*, 165 Wn.2d at 29-30; *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

In this case, the deputy prosecutor did exactly that. The deputy prosecutor started her argument by telling the jury that she "must have sat through a completely different then [sic] defense." RP 2. Through this argument, the deputy prosecutor told the jury that defense counsel's knowledge of the case was based on such a grossly incorrect grasp of the evidence that she must not have been at the trial. If this is not a personal denigration of defense counsel, it is hard to imagine what could be. This comment is flagrant, ill-intentioned, and clearly let the jury know what the

prosecutor thought of defense counsel. It deprives Mr. Selley of his fundamental 6th Amendment constitutional right to the assistance of counsel.

In addition, material misstatements of fact have received judicial condemnation and is a serious violation producing frequent reversals. Prosecutors are prohibited from intentionally arguing facts unsupported by the evidence. *State v. Papadopoulos*, 34 Wash. App. 397, 401, 662 P.2d 59, review denied, 100 Wash. 2d 1003 (1983).

In this case, the deputy argued in rebuttal that "different than the defense did" [again denigrating the defense] ...I heard from Dr. Clark that her injuries were not consistent with a fall down the stairs. She characterized the fall down the stairs as a red herring and asserted that Dr. Clark had not testified that Southwards injuries were inconsistent with a fall down the stairs. RP22 3250. This in fact, was not true as Dr. Clark in fact did testify that the displaced rib fractures could well have been caused by a fall and also that they could have caused the lacerations to the liver. RP16 2458 He could not rule out a stairs fall. *id* He did not attribute the colon perforation to a fall, yet interestingly, he did testify that the colon perforation could have been caused by blunt force trauma, poor blood flow, illness, etc. RP16 2467 . The prosecutor's failure to accurately and thoroughly summarize Dr. Clark's

testimony is contrary to the prosecutor's duty to do justice and more consistent with the win at all costs school of prosecution.

The deputy prosecutor then proceeded to mislead the jury by arguing that even if there had been a fall, there would have been more widely distributed injuries. RP22 3251. Of course, the State's own physicians testified that Southward had widely distributed injuries consistent with a fall down the stairs. RP14 2124, 2158 RP16 2447-2448 . The State continued to misrepresent the evidence by arguing that a fall down the stairs would result in fractures to the extremities and serious spinal and head injuries. RP22 3252. Of course, this argument was not based on the evidence either.

Likewise, the deputy prosecutor egregiously misstated the evidence regarding Kate's fall down the stairs. RP22 3252. She erroneously argued that such evidence was provided only by Mr. Selley. *Id.* Of course, Mr. Selley did so testify. At the same time, that testimony was in the medical record and the physicians at Tacoma General relied on it. It apparently came from the medics, who apparently received it from Southward. Testimony of Dr. Inouye, 11/18/14.

The prosecutor then misargued the import of Dr. Clark's statement on the death certificate that Southward's death was a homicide. RP22 3253. As Clark testified, this was not a finding to be used in a criminal case. This was

merely a statistic for Health Department records. RP16 2437-2439. Yet the prosecutor improperly used it as substantive evidence and it was unfairly prejudicial to Selley. In essence, it placed Dr. Clark in the position of the a 13th juror.

It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)) However, in this case, the deputy prosecutor herself then personally vouched for the testimony of the Dr. Clark. "I'm telling you that the man with 4,200 autopsies, 27 years of experience looked at Kate Southward's body after her death, examined it, and did not find this was a fall from the stair s. He found that it was from her being beaten to death." RP22 3253. Of course, in this statement, not only did the prosecutor impermissibly vouch but she also again misused a finding from the death certificate that was not intended to be evidence in a criminal trial. RP22 3253.

The fact is that there are multiple ways for blunt force trauma to occur. RP 16 2457-2467 . There is no way to determine based on the injuries to Southward how the blunt trauma was inflicted. Dr. Clark could not and did not identify any basis for the conclusion that the blunt force trauma resulted

from her being beaten to death. Passim. The only source of that information had to have been the detectives who were present at autopsy. RP 16 2439.

Finally, it is impermissible for a prosecutor to appeal to the passions and prejudices of the jury. *State v. Lindsay*, The prosecutor's raised voice and parading of gruesome photos before the jury while shouting: "THAT'S WHAT GETTING THE SHIT BEAT OF YOU LOOKS LIKE!" drew an objection from the defense and an order from the court to "dial it back just a little bit." RP22 3255-3256. The prosecutor then returned to the theme of its opening statement that the injuries Southward suffered at Selley's hands caused her death and that he denied her medical treatment not because Southward told him she felt fine. The State, without a shred of evidence, argued that Selley held her captive hoping that she would get better. RP22 3257.

The sole purpose of these statements of pure opinion was to inflame the jury prior to their leaving the jury box to enter deliberations. It did not advance any substantive argument in anyway and was presented in such a way as to inflame the jury's passion by showing grotesque photographs in an emotional and loud manner. Such an improper appeal to passion and prejudice is entirely improper. *State v. Walker*, 182 Wn.2d 463; 341 P.3d 976, 985-986 (2015).

Comments made at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2015) citing, *e.g.*, *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011) . This is so be because the prosecutor's improper statements "at the end of his closing rebuttal argument, are the last statements the jury hears before it commences its deliberations"); *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)

2. THE TRIAL COURT ERRED WHEN IT FAILED TO ADMIT EVIDENCE THAT SOUTHWARD WAS A CHRONIC ALCOHOLIC WHERE THAT EVIDENCE WAS ESSENTIAL TO THE DEFENSE.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038. 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* The right to confront and confront and cross-examine adverse witnesses is also guaranteed by both the federal and state constitutions. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct.1920, 18 L.Ed.2d 1019 (1967)).

These rights are not absolute, of course. Evidence that a defendant seeks to introduce "must be of at least minimal relevance." *Id.* at 622. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* The courts must remember that "the integrity of the truth finding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Further, the court has emphasized that for evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

a. The erroneous exclusion of Southward's chronic alcoholism throughout the charged period and up until her death completely denied Selley a fair trial because it denied him his right to cross-examine her statements.

A jury is entitled to consider intoxication when evaluating the credibility of a witness. Evidence of intoxication is admissible for impeachment. State v. Russell, 125 Wn.2d 24, 83-84, 882 P.2d 747 (1994).

Mr. Selley is entitled to impeach the hearsay statements made by Southward when she had been drinking alcohol. This is permitted under ER 806, entitled "Attacking and supporting credibility of declarant", which provides: " When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination."

The trial court denied Selley's motions to admit evidence of Southward's chronic alcoholism, despite its obvious relevance.

It was well established that Southward had a significant alcohol addiction. In this case, Southward told medical staff at St. Anthony's Hospital in September 2010 that she drank a quart of alcohol a day. She was able to drive to the hospital despite having a high breathalyzer reading of .36.

She, by her own admission, had been drinking at a bar before she went to the Larriva residence. RP10 1497. Her brother, who picked her up from that residence, could tell that she had been drinking. RP11 1685 . It is highly likely that her intoxication caused her to make such wildly inconsistent statements to the Larrivas.

Regarding her statements about what happened during the alleged December 2010 event, Southward again gave completely different statements to various individuals about what had happened to her. She did not tell her brother how she received the bruises on the thighs that he photographed. RP 11 1716. At any rate, those bruises are inconsistent with the other versions she gave. RP11 86 RP12 1849, 1867, 1868 RP11 1651,1652 . She told her sisters that Selley had picked up the TV stand and thrown it at her chest. RP12 1849, 1867. Of course, the TV is so heavy and bulky that it cannot be picked up by one person. RP20 2867, 2868 When she went to Tacoma General Hospital, she told the nurse that she had been hit in the chest. RP11 1615. She complained of chest pain. RP11 1653. The nurse did not see any bruising.

RP11 1652. Southward told the nurse that she felt safe going home. RP11 1658.

Mr. Selley should have been allowed to explain Southward's inconsistent statements by showing that her memory likely was clouded by her alcoholism and that her ability to recall what had happened was in at issue.

The jury should have known this information when evaluating whether any of these incidents in fact occurred.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. SELLEY COMMITTED THE CRIME OF MURDER IN THE SECOND DEGREE [FELONY MURDER BY ASSAULT] AGAINST SOUTHWARD.

Mr. Selley was charged with murder in the second degree, which required the State to prove:

(1) That on or about the period between September 23, 2012 and September 27, 2012, the defendant committed the crime of assault in the second degree;

(2) That the defendant caused the death of Kathryn Southward;

(3) That Kathryn Southward was not a participant in the crime of assault in the second degree;

(4) That the acts occurred in Pierce County.

RCW 9A.32.050(1)(b).

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). The court views the evidence in the light most favorable to the State and affords the State all reasonable inferences that can be drawn from such evidence. *Id.* We must also defer to the fact finder on issues of general witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

However, when the court examines probity or quality of expert medical testimony, including medical testimony to establish a causal connection between and injury a subsequent condition, the testimony must meet the meet the "reasonable medical certainty standard." This expert opinion testimony generally is not admissible, or important, or sufficiently

weighty on the subject unless the expert holds his or her opinion with reasonable medical and psychological certainty. *State v. Martin*, 14 Wn. App. 74, 76-77, 538 P.2d 873 (1975), *review denied*, 86 Wn.2d 1009 (1976). In *Orcutt v. Spokane Cy.*, 58 Wn.2d 846, 364 P.2d 1102 (1961), the court held that medical testimony to establish a causal connection between an injury and a subsequent condition must show that the injury "probably" or "more likely than not" caused the condition rather than "might have", "could have", or "possibly did". *Orcutt*, at 853. From this, later cases interpreted "reasonable medical certainty" to mean "more likely than not". *See, e.g., State v. Terry*, 10 Wn. App. 874, 884, 520 P.2d 1397 (1974)(pathologist who stated he could not give an opinion on the cause of death with "reasonable medical certainty" could testify that a particular cause of death was "more probable than not", satisfying the standard). Both *Martin* and *Terry* indicate, however, that if the expert's opinion exhibits reasonable medical certainty, the standard is met. *Martin*, at 76-77; *Terry*, at 884.

In this case, the State contended that Selley's alleged assault of Southward coupled with an apparent indifference or refusal to obtain medical care for her caused her death . However careful scrutiny of the medical testimony confirms that the State did not meet its burden because the medical testimony failed to rise to the level of reasonable medical certainty.

The State offered testimony from:

[a] Cynthia Smith, a physician assistant, who testified, *without reasonable medical certainty*, that the mechanism of they observed during the exploratory laporatomy was more consistent with those type of injury patterns from assault. RP13 2011.

[b] Dr. Robert Jacoby, the trauma surgeon who performed the exploratory laporatomy, was not able to answer with reasonable medical certainty [or probably" or "more likely than not"] any questions regarding what could have caused Southward's injuries, including the perforations to the bowel and the colon. E.g., RP14 2092.

[c] Dr. Jason Love, a pathologist, looked at slides of a portion of the right bowel as well as the colon of Southward. RP14 2159-2162. He did not render any opinion with medical testimony to establish a causal connection between the injury and an underlying causation that satisfied the "reasonable medical certainty standard." RP14 2171, 2173-2174, 2178.

[d] Dr. Paul Inouye, the trauma surgeon who treated Southward in the emergency department and also during this stay in the hospital, testified that he did not have any forensic expertise to testify that Southward's bruises and injuries were caused by assault. RP15 2278, 2280. In response to a

question from the State, he stated that it was "possible" that her injuries were consistent with an assault. RP15 2302.

[e] Dr. Clark, the Pierce County Medical Examiner, testified that the bruises to the arms, the left eye, "could have arisen as a result of injury, but not necessarily." RP15 2398. He could not exclude a fall down the stairs as causing the rib fractures which conceivably could have caused the liver laceration. RP16 2433. Dr. Clark entered the cause of death on the death certificate as "blunt force trauma to the chest and abdomen; beaten by another." RP16 2436-2437. Dr. Clark acknowledged that his statement that the death was a homicide was not a legal determination but was merely for the Department of Health. RP16 2438. Although Dr. Clark did not have a patient history and agreed that the injuries to Southward were consistent with factors other than assaults and beatings, he represented that he held his opinion regarding the manner and course of death correctly to a reasonable degree of medical certainty. RP16 2466-2467. Of course, none of his underlying opinions which formed essential predicates to those ultimate opinions were held to that level of certainty. *Passim.* On re-direct, the State clarified that Dr. Clark held his opinion to a reasonable medical certainty that this death was a homicide. RP16 2471-2472. However, Dr. Clark never provided an opinion that was a legal or forensic determination to a reasonable medical certainty

that the cause of death was blunt force trauma. Passim. That opinion appeared only on the death certificate and was not made for any purpose other than State of Washington – Department of Health statistics. RP16 2472.

Absent the medical testimony, the State's evidence consisted of contradictory statements from Southward. She stated that she did not know what had happened to her, that Selley had not hurt her, that she did not want to see anyone get in trouble, that she was safe at home. However, to Det. Salmon alone testified that Sutherland said that "Barry had punched her."

The domestic violence incidents that the State offered in support of the aggravator were used as ER 404[b] evidence. However, the evidentiary value of those incidents is described below. And certainly they do not tend to establish an on-going pattern of abuse that comports with events of September 23 through 27, 2012.

Because the State failed to prove the charge of second degree murder beyond a reasonable doubt, this court must reverse Mr. Selley's conviction.

4. THE STATE FAILED TO PROVE THE DOMESTIC VIOLENCE AGGRAVATOR BEYOND A REASONABLE DOUBT.

The State alleged the aggravator of RCW 9.94A.535(3)(h), "The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was

present: **(i)** The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." RCW 9.94A. S37 (a). Assault is a domestic violence offense under RCW 10.99.0020.

This statute speaks of an "on-going pattern" of abuse. Courts use the common meaning of "pattern," which is "'a regular, mainly unvarying way of acting or doing." *State v. Russell*, 69 Wn.App, 237, 247, 848 P.2d 743 (1993) (quoting Webster's New World Dictionary 1042 (1976).

The common ordinary meaning of "on-going" is "currently taking place; in progress or evolving; continually moving forward; actually in progress; developing." American Heritage Dictionary of the English Language, Fifth Edition 2011 by Houghton Mifflin Harcourt Publishing Company.

Under this definitions, the aggravator was not proven. The incidents simply were not part of a "regular, mainly unvarying way of acting or doing" nor were they "on-going."

The State intended to offer evidence of four incidents of domestic violence to prove the aggravator. Those were the Gary Robinson matter, the Larriva matter, the December 2010 matter, and a matter that would be testified to by Lynette Mahoney, Selley's mother. RP11 1694.

The State failed to prove the aggravators both under the plain meaning of the statute and also by sufficiency of the evidence.

[a] The Gary Robinson's testimony re: incident in May-June 2012 or October 2011 failed to satisfy either the corpus delecti rule or the "on-going pattern" of abuse requirement of the statute.

The State's evidence for this incident fails to meet the standard for sufficiency of the evidence under the corpus delecti rule. Corpus delicti" means the "body of the crime" and requires the State to prove both a criminal act and a resulting loss. *State v. Witherspoon,* 171 Wn.App. 271, 286 P.2d 296, 996 (20120; *See State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In Washington, a defendant's incriminating statements are not sufficient, standing alone, to establish that a crime took place. *Brockob*, 159 Wn.2d at 328. The State must present independent evidence corroborating the defendant's incriminating statement. *Brockob*, 159 Wn.2d at 328-29. The court may then consider the independent evidence in connection with the defendant's confession and establish the corpus delicti by a combination of the confession and the independent proof. *Aten*, 130 Wn.2d at 656. The independent evidence need not be sufficient to establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of proof. *Aten*, 130

Wn.2d at 656. There must be evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. *Aten*, 130 Wn.2d at 656.

In the instant case, the State's "evidence" of this prior incident of domestic abuse consisted entirely of statements attributed to Selley by a former co-worker Gary Robinson. That was all of the "evidence" the State had to offer on that subject. There was no independent proof that Selley had ever laid a hand on Southward at the time of the supposed statement.

The State called Gary Robinson to testify about a conversation where Selley reportedly admitted "abusing" Southward. RP8 1098. This conversation occurred at a car dealership where they both worked in late 2011 and early 2012. RP8 1096,1100-1101. Robinson stated that Selley told him that he had beat up Southward and that she had dark looking blood or stuff coming out of her system, nose and mouth and he was concerned she wasn't moving around very much. She had been on the couch for a couple of days and he did not know what to do. RP8 1098. He believed that this conversation occurred in October 2011. RP8 1100. Robinson did not know whether Selley ever sought medical treatment for Southward for these injuries. RP8 1101.

Although Robinson believed that Selley "most likely kicked and hit" Southward's abdominal area, Selley never stated that. RP8 1103, 1121, 1122,

1132. Likewise, Selley never stated that he had "pushed" Southward, RP8 1132. Robinson recalled only that Selley said that he "abused" Southward. Id.

Robinson's knowledge of this incident was based solely on Selley's statements. The State presented no corroborative evidence whatsoever that this incident occurred.

[b] Larriva residence.

Diego and Cheryl Larriva were home at 3921 70th Avenue NW in July 2011 when Southward came to their door one night. RP10 1490-94, 1496, 1528. She had a bloody nose. RP10 1495. Cheryl took her into the bathroom to get cleaned up. RP10 1496. Inside the bathroom, Cheryl asked her what had happened and Southward replied she and her boyfriend had been at a bar and that some boys had talked to her. Her boyfriend was jealous, they left, went home and were arguing. She said that her boyfriend hit her and then chased her down the street. RP10 1497. She said she had been hiding in the woods until it was safe to come out and then went to the Larriva house. RP10 1497-1498. She had pine needles on her. RP!) 1498. Cheryl offered to call the police but Southward was not interested. RP10 1499, 1532. Southward wanted to call her brother to come pick her up. RP10 1499. Cheryl contacted the police after reading in the paper about Southward's death. RP10 1507. Some

of the information that she gave police was information she had learned in the newspaper. RP10 1506.

Robert Southward picked us his sister from the Larrivas. RP11 1685. She never told him what had happened. RP11 1685.

Although the jury may have concluded that Southward had some type of argument with Selley and was possibly struck during that argument, that incident fails to meet the "on-going pattern" requirement of RCW 9A.46.110,

[c] *Southward's Conflicting Reports of a December 2010 incident*.

After Southward died, her family sat down together and wrote out statements for the case. RP11 1729. They shared memories about timelines and joint information about who was with Kate when and what they were doing. RP11 1729-1730.

In early December 2010, Southward moved back to her family home. RP11 1686. She had some bruises on her arms and legs. RP11 1686. Southward never told Robert what had caused the bruises. RP11 1716. Robert Southward took photos on the bruises and provided them to the prosecutor after she died. RP11 1688. I took the photos to document the injuries because he felt "like they needed to be provable." RP 1707. He did not show the

photos to anyone when his sister was alive. RP11 1715. In a defense interview, Southward stated that his sister was not distraught at the time the photos were taken. RP11 1721. Southward recalled that he took the photos just before one of his sisters took Southward to treatment or a hospital. RP11 1726.

Her sister Lisa McAllister observed those bruises on Southward. RP12 1848. She saw bruises consistent with those in the photos taken days before by her brother. RP12 1849. Southward wanted to go to the hospital because she said that Selley had thrown a TV stand on her chest. RP12 1849, 1867. She had recounted to McAllister that they had a new flat screen TV that was attached to a stand. RP 12 1867-1868. Southward stated that Selley had taken the new flat screen tax off the stand, then picked up the stand, brought it over his head, and hit her in the chest with it. RP12 1868.

The television stand was a heavy and bulky item. RP20 2867-2868. One person alone could not move it, much less pick it up and throw it. RP20 2868.

McAllister and another sister Susan took her there. RP12 1849. Prior to going to the hospital, they took her to the Crystal Judson Center. RP12 1851.When asked in a pretrial interview whether Southward actually wanted

to go to the Judson Center, McAllister had replied, "No, we took her there." RP12 1872.

When Southward was seen at Tacoma General, she complained that she had been repeatedly kicked and/or punched in the chest by her significant other. RPP11 1651. She did not tell the same story that she had told her family about her boyfriend picking up the TV stand and throwing it on her chest. *Passim.* Nurse Howard examined her and saw no bruising anywhere on her body. RP11 1652. Southward reported tenderness on the right and left sternum as well as over the sternum itself. RP11 1653. Nurse Howard ordered a chest X-ray, an EKG.. RP11 1653. No fractures or abnormal findings were noted. RP11 1652-1653. When Southward left the ER, she was in no apparent distress. RP11 1661.

One would expect to see bruises on an individual who had been punched and/or kicked very hard. RP11 1656. Nurse Howard did not ask Southward about the force of the contacts. RP11 1655. Nurse Howard did not ask Southward if she had called the police. RP11 1657.

Again, the State's proof is insufficient to prove the aggravator. First, it is impossible to know which of these wildly inconsistent versions the jury found to have occurred. Next, and most importantly, none of these incidents fit into the statutory requirement of "on-going pattern.:

Viewing the evidence in the light most favorable to the State, the State proved that in July or August 2011, Southward may have been struck in the face by Selley, In December 2010, Southward may have had a TV stand placed upon her chest by Selley *or* may have been punched in the chest by Selley *or* may have been hurt in some way [never disclosed to her brother Southward] resulting in bruises on her arms and legs. There is no "on-going pattern of abuse" here. The alleged incidents are remarkably different.

From that evidence there was not a pattern. It is questionable even whether it was "on-going." For these reasons, this court must find that the State failed to prove beyond a reasonable doubt the charged aggravator.

5. BECAUSE THE STATE FAILED TO PROVE THE RCW 9.94A.535(3)(h) AGGRAVATOR OF "AN ON-GOING PATTERN OF ABUSE", THE TRIAL COURT'S FINDINGS OF FACTS 2, 3, 4, AND CONCLUSION OF LAW NO. 1 ARE NO LONGER SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE MUST BE STRICKEN.

Under the Sentencing Reform Act of 1981, no exceptional sentence may be imposed absent proof beyond a reasonable doubt unless stipulated by a defendant. This requires that the facts supporting an exceptional sentence (other than a prior conviction) must be found by a jury beyond a reasonable doubt. RCW 9.94A.537(3).

The trial court entered findings of fact and conclusions of law in support of the exceptional sentence CP 392-395. In findings of fact nos. 2, 3, and 4 the trial court finds a factual basis for exceptional sentence based on the jury's finding of the domestic violence aggravator that was proven beyond a reasonable doubt at trial.

Because, as argued above, the State did not prove that aggravator beyond a reasonable doubt, the findings of fact are no longer valid nor is the conclusion of law. This is a nunc pro tunc invalidity. However, nonetheless reversal is mandated and Selley is entitled to resentencing.

6. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE DEFENDANT'S PROPOSED INSTRUCTION NO. 9. THE NO DUTY TO SEEK MEDICAL CARE.

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (citing *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004)). The State must prove every element of the offense beyond a reasonable doubt. If the State does not meet this burden, the

jury cannot convict the defendant. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Further, to guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by evidence. Barnes, 153 Wn.2d at 382. At the very least, the instructions must reflect a defense arguably supported by the evidence. *Id.*

In this case, the State alleged that Selley assaulted Southward in the early morning hours of September 24, 2012. The State alleged that Selley let her languish at the residence without calling for medical aid for her.

The prosecutor's theme in opening statement was, "*Kate's dye was cast for the doctors and nurses before Tacoma General Hospital could get to her. That's because the defendant made a 911 call three days too late.*" RP2 142-143. He anticipated that Dr. Richardson would testify that Southward had lain on a hard surface for "at least a day or two" after they returned from the bar in the early hours on the 24th and the call to 911 in the early hours of the 28th. RP2 147. The prosecutor emphasized that Dr. Jacoby "*was the one that said her dye was cast before we even got to her.*" RP2 148. The State argued

that Selley was the only person who had "control" over Southward after she left the bar. RP2 151. Thus, the State's theory was that "the dye was cast" when Selley did not seek prompt medical aid for her.

The State's case thus put before the jury a picture of the defendant not only as a ruthless assailant but also as a heartless uncaring individual who watched his long-time likely comatose girlfriend approach death before summoning medical aid for her.

Even assuming arguendo that the State had evidence that Selley assaulted Southward between September 23, 2012 and September 27, 2012, the State had no evidence whatsoever that Selley knew that Southward was so sick that a call to 911 should have been earlier than the call he did make, that Selley prevented Southward from calling medical aid, and/or that Selley had any duty to call for medical aid for Southward. Southward did not want medical treatment after she fell at the bar. RP19 2813

The uncontroverted evidence in this case was that Southward was mentally alert and aware until late Wednesday afternoon. Throughout those days, Selley repeatedly asked her if she wanted to go to the hospital, to see a doctor, etc. Southward was adamant that she did not want to do so. RP20 2907, 2934 RP8 2936-2937, 2943, 2944 The simple truth is that people have the right to make decisions, including ill-informed and even just plain stupid

decisions, about their own health care. Selley could not force her to seek care. However, after she became so ill that she seemed disoriented and unable to function, Selley did call 911. RP20 2952

Defendant's proposed instruction no. 9, while perhaps inartfully worded was a correct statement of the law and was necessary for the defense to argue its theory of the case and also to respond the theme the State set out in opening.

The instruction provided:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. However, a person has a right to privacy and to be free from bodily invasion and a defendant is not obligated to disregard another adult's wishes by forcing on him/her unwanted medical care. CP 183

Without this instruction, the State was free to argue that Selley had the duty to seek medical care for Southward and that his failure to do so caused her death. RP22 3257 . By making this argument, which could not have been charged under criminal mistreatment statutes, the State was able to generate even greater animus for the defendant whom it could accuse of such callous disregard for Southward that he would not even summon medical aid for her.

Under the facts of this case, where the State had expanded its argument for Selley's culpability, the trial court should have given defendant's proposed instruction no. 9. There was evidence that Southward had refused several times to seek medical treatment during the period between September 24, 2012 and September 27, 2012 RP20 2907, 2934, 2936, 2939, 2943, 2944.

The instruction was necessary to permit the defense to argue its theory of the case, especially in conjunction with instruction no. 13, the proximate cause instruction. The doctors testified that there was a "golden hour" when Southward's injuries would have been survivable had she sought medical care. RP14 2135 . She adamantly and repeatedly declined medical care. *Supra*

D. CONCLUSION:

For the reasons stated herein, the Court should grant Selley relief.

DATED this 4th day of January, 2016.

Barbara Corey, WSB # 11778
Attorney for Appellant

CERTIFICATE OF SERVICE:
The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the Appellate Unit, Room 946 County-City Building, Tacoma, Washington 98402 a true and correct copy of the document to which this certificate is attached. This statement if certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1/4/16
Date

Signature

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

WILLIAM BARRY SELLEY, Petitioner, *vs* STATE OF WASHINGTON, Respondent.	**NO.** 47273-2 COURT OF APPEALS DIVISION II DECLARATION OF MAILING

WILLIAM DUMMITT, declares under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on the 5th day of January, 2016, I delivered via U.S. Mail, a copy of the CORRECTED BRIEF OF APPELLANT to William Barry Selley DOC#964495 at the Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

DATED: 1/5/16

William Dummitt

LAW OFFICES OF BARBARA COREY, PLLC
902 South 10th Street
Tacoma, WA 98405
253.779.0844